

Insights

Pay Attention to Prevailing Party Fee Provisions

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It is routine in Florida leases to consider any prevailing party fee provision as automatically reciprocal due to Section 57.105(7), Florida Statutes. That Statute provides for reciprocity of attorneys' fees even where a contract provision is written only in favor of one party. On October 7, 2021, the Supreme Court of Florida in *Levy v. Levy* (Fla. 2021), found that the following provision did not automatically trigger a fee award to the prevailing party, where the prevailing party did not establish that the non-prevailing party was in violation of the agreement:

"13. ENFORCEMENT. In the event that either party should take legal action against the other by reason of the other's failure to abide by this Agreement, the party who is found to be in violation of this Agreement shall pay to the other party who prevails in said action, the prevailing party's reasonable expenses incurred in the enforcement of this Agreement, said expenses to include, but not be limited to, reasonable attorney's fees"

The Court held that a finding that the non-prevailing party was in violation of the agreement was a condition precedent to the award of attorneys' fees. Therefore, in a case where the plaintiff alleges that defendant was in default under the agreement, but defendant successfully defends the case by establishing that defendant was not in violation, defendant is not entitled to its attorneys' fees because the condition precedent to enforcement was not met, i.e. no one was found to be in violation of the agreement.

The opinion remains subject to further rehearing and is therefore not final; however, if it remains in place, it presents an interesting drafting issue for Florida landlords. The overwhelming majority of landlord / tenant litigation is initiated by a landlord as a result of an alleged tenant default under the lease. As a result, Florida landlords could include a similar provision to *Levy* in their leases on the theory that they are likely to be the only party alleging a breach. If the landlord prevails on its theory of breach, it would be entitled to attorneys' fees. If the landlord does not prevail and tenant does not establish that landlord was in default, only that tenant was not in default, no attorneys' fees would be awarded. The practical effect shifts the attorney fee risk away from the landlord and onto the tenant in most

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cases.

In light of the *Levy* decision, Florida landlords should consider revisiting their lease attorneys' fee provisions and tenants should carefully read the provisions they are agreeing to as there is a very real risk that a tenant would prevail in defensive litigation, but not be entitled to reimbursement of attorneys' fees.